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DISTRICT IV

January 28, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2014AP2056 State of Wisconsin ex rel. Robert L. Tatum v. Michael Meisner (L.C. # 2013CV2608)

Before Higginbotham, Sherman, and Blanchard, JJ.

Robert Tatum, pro se, appeals an order dismissing his petition for a writ of certiorari due to lack of service. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).[1] We reject Tatum's arguments, and summarily affirm the order.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Tatum sought certiorari review of a prison disciplinary decision made while he was an inmate at Columbia Correctional Institution ("CCI"). A writ of certiorari can be commenced in one of three ways: (1) under WIS. STAT. § 801.02(1), which permits use of a summons and a complaint; (2) by service of an appropriate original writ; or (3) by filing a complaint if service of the complaint and of an order is made upon the defendant. *See* ***Nickel River Investments v. City of La Crosse Bd. of Review***, 156 Wis. 2d 429, 431-32, 457 N.W.2d 333 (Ct. App. 1990). Tatum attempted to proceed utilizing the second method.

Although a prisoner's certiorari action is commenced at the time the writ petition is filed, *see* WIS. STAT. § 893.735(3), the prisoner still must serve his or her action. The circuit court lacks personal jurisdiction over the respondent unless the respondent has been served with the writ and petition within ninety days of their filing. *See* WIS. STAT. §§ 893.02 and 893.01; *see also* ***Irby v. Young***, 139 Wis. 2d 279, 281, 407 N.W.2d 314 (Ct. App. 1987) (section 893.01 makes chapter 893 applicable to civil actions, and writ of certiorari is a civil action). The petitioner is responsible for obtaining the writ from the court and serving it upon the respondent. ***State ex rel. DNR v. Walworth Cty. Bd. of Adjustment***, 170 Wis. 2d 406, 419, 489 N.W.2d 631 (Ct. App. 1992).

On August 3, 2013, Tatum filed his petition for a writ of certiorari against the now former CCI warden, Michael Meisner.[2] The signed writ was issued by the circuit court on September 26, 2013, thus requiring Tatum to serve the writ and petition upon Meisner by

[2] Although the petition also named Department of Corrections Secretary Edward Wall as a respondent, Tatum abandoned the action as to Wall.

December 26, 2013.[3] Tatum put a copy of the petition and writ in an envelope and gave it to a correctional officer to serve the warden by "internal process." Tatum does not dispute that he used the internal prison mail system to attempt service upon Meisner. The documents were returned by Jill Sommers, CCI's Offender Records Supervisor, with notice that Tatum had not arranged for proper service. A second attempt at service using the internal prison mail system was likewise returned for lack of proper service. The circuit court ultimately granted Meisner's motion to dismiss for lack of personal jurisdiction due to improper service.

Tatum contends he properly served the writ and petition. A warden, however, is to be served in the same manner as any other resident of Wisconsin. *See* WIS. STAT. § 302.025(1). The process for serving a resident of the state, or "natural person," is governed by WIS. STAT. § 801.11. Pursuant to § 801.11(1)(a) and (b), personal service is required. Although the statute provides alternatives that a plaintiff may use in serving the summons upon a natural person, the plain language of subsection (1) requires that personal service be attempted with "reasonable diligence" before an alternative method of service is employed. Section 801.11(1)(a); *see also* ***Loppnow v. Bielik***, 2010 WI App 66, ¶10, 324 Wis. 2d 803, 783 N.W.2d 450. Where personal service is required, service by mail is insufficient. *See* ***Sacotte v. Ideal-Werk Krug & Priester Machinen-Fabrik***, 121 Wis. 2d 401, 406, 359 N.W.2d 393 (1984) ("legislature did not intend to include service by mail as a method of personal service").

Tatum's attempt to serve Meisner through the prison's mail system was insufficient. Despite the opportunity to cure, Tatum failed to effect personal service on Meisner. Tatum

[3] Because the ninetieth day fell on Christmas, the due date shifted to Thursday, December 26. *See* WIS. STAT. § 990.001(4)(b).

nevertheless claims he complied with alternative methods of service outlined in WIS. STAT. § 801.11. There is no indication, however, that Tatum was reasonably diligent in first attempting to effect personal service, such that an alternative method of service was available. In addition, even assuming reasonable diligence, Tatum fails to establish proper service under the alternatives claimed. First, Tatum asserts service by publication because his friend, Linda Mohammed, sent an email about the case to Meisner. A personal email from Mohammed to Meisner, however, does not constitute proper publication under the statute. *See* WIS. STAT. CH. 985; § 801.11(1)(c).

To the extent Tatum claims proper service under WIS. STAT. § 801.11(1)(d), that subsection requires "serving the summons in a manner specified by any other statute upon the defendant or upon an agent authorized by appointment or by law to accept service of the summons for the defendant." There is no indication that Sommers was personally served or that she, as the CCI Offender Records Supervisor, was an agent authorized by appointment or by law to accept service for Meisner. Finally, service under § 801.11(4) is inapplicable, because that section addresses service upon "political corporations or bodies politic" and Meisner is a natural person. Because Tatum failed to effect service on Meisner, the circuit court properly dismissed the action for lack of personal jurisdiction.

Tatum alternatively contends the circuit court erroneously exercised its discretion by denying his request to subpoena witnesses for the hearing on Meisner's motion to dismiss. Whether the circuit court properly denies a request to subpoena witnesses is reviewed for an erroneous exercise of discretion. *See* ***Wright v. Industrial Comm'n***, 10 Wis. 2d 653, 660, 103 N.W.2d 531 (1960). In light of our deferential review, we will affirm so long as the circuit court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated

rational process, reached a conclusion that a reasonable judge could reach." ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Even when the circuit court does not adequately explain its reasoning, we may search the record to determine if it supports the court's discretionary decision. ***Randall v. Randall***, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737.

Tatum sought to call Mohammed to testify regarding her email to Meisner. This testimony would have been irrelevant because email does not constitute publication for purposes of service under the statute. Tatum also wanted Meisner and Sommers to testify that Sommers was authorized to accept service on Meisner's behalf, and that each of them received the writ and petition. Even if these witnesses were to testify to these alleged facts, Tatum's attempted service via the prison mail system was insufficient and Meisner's and Sommers' alleged actual knowledge of the pending action is irrelevant. *See* ***Danielson v. Brody Seating Co.***, 71 Wis. 2d 424, 429, 238 N.W.2d 531 (1976) (actual notice of pending action insufficient to confer personal jurisdiction).

Finally, Tatum sought to question the correctional officer who was given the pleadings for service via institution mail. That Tatum gave the correctional officer his pleadings for service through the institution's mail system proves only that Tatum attempted service by mail, which is insufficient. Because the proffered testimony was either irrelevant or cumulative, the circuit court properly exercised its discretion by denying Tatum's request to subpoena these witnesses.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals